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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 672

GIANT FOOD INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 307 F. 2d 184. The opinion of the Federal Trade Commission (J.A.[1] 121–129), is not yet officially reported.

JURISDICTION

The final decree of the court of appeals was entered on September 18, 1962 (Pet. App. 8a–9a), and petitions for rehearing and rehearing *en banc* were denied on the same day (Pet. App. 9a–10a). The petition

[1] "J.A." refers to the printed Joint Appendix in the court of appeals.

for a writ of certiorari was filed on December 17, 1962. The jurisdiction of this Court is invoked under 15 U.S.C. 45(c), and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's findings are supported by substantial evidence.

2. Whether in a proceeding under Section 5 of the Federal Trade Commission Act, in which a buyer is charged with inducing and receiving from its suppliers discriminatory allowances which it knew were not made available to its competitors on proportionally equal terms, the Commission must carry the burden of coming forward with evidence that the suppliers' grants of the allowances were not made in order to meet similar offers to the buyer from their competitors.

3. Whether the Commission's cease-and-desist order, as modified by the court of appeals, is sufficiently definite.

STATUTES INVOLVED

Pertinent portions of Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, and of Section 5 of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45(a)(1), are set forth at pages 3–4 of the petition.

STATEMENT

Petitioner, the operator of a large chain of retail grocery stores and supermarkets in Maryland, Virginia, and the District of Columbia,[2] purchases prod-

[2] At the time of the commencement of this case, petitioner operated 28 stores which, for the fiscal year ending April 30, 1955, had total sales of about $60 million (J.A. 98). As of

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ucts from approximately 500 suppliers located throughout the United States (J.A. 98). In 1954, 1955, and 1956, petitioner conducted various promotions called "Anniversary" sales or "Candy Carnival" sales, for which it prepared, and sent to virtually all of its suppliers, "contracts of participation." It urged them to make payments to petitioner of various amounts, such as $100, $250, $500, $750, or $1000, in return for advertising and promotion of the suppliers' products (J.A. 100–101; 121; 145). The sum specified in each contract was determined by petitioner (J.A. 143), and each contract explicitly provided that: "This contract does not alter or replace currently existing advertising or merchandising agreements between [petitioner] and participating manufacturers" (J.A. 223–228). About 150 of these contracts were accepted by suppliers throughout the country, as a result of which petitioner received a total of $37,875 during its "19th Anniversary Sale" in 1955 (J.A. 101; 121). Petitioner does not deny that it thus induced and received payments of substantial sums from suppliers.[3]

In response to petitioner's solicitations, some suppliers declined to accept the contract. The reasons given included the following: (a) that proportionalized payments could not be made to other customers; (b) that counsel had advised the suppliers that mak-

October 14, 1959, it operated 49 stores, grossing $116,617,056 (J.A. 102).

[3] Petitioner did not introduce any evidence in the administrative proceeding (J.A. 221).

ing such payments would violate the Clayton Act or (c) that such contracts would not be approved by the Federal Trade Commission (J.A. 102; 239 253; 255–257).

In a proceeding in which it was charged that petitioner had violated Section 5 of the Federal Trade Commission Act, the Commission found that petitioner had induced and received discriminatory payments, which it knew or had reason to know were not, and could not, be made available on proportionally equal terms to its competitors in the resale of like products (J.A. 102–106; 108–110; 115–116; 121 126). Such knowing inducement and receipt, the Commission concluded, constituted unfair methods of competition and unfair acts and practices in violation of Section 5 (J.A. 88–89; 116–117; 125–126). The Commission entered an appropriate cease-and-desist order (J.A. 119–120).

The court of appeals affirmed the findings of violations in all respects (Pet. App. A), but modified the order to make it more explicit.

ARGUMENT

1. Petitioner does not seek review of the holding below that a large retailer, which has knowingly induced its suppliers to violate Section 2(d) of the Clayton Act by granting preferential promotional allowances is itself guilty of engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Accord, *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92 (C.A. 2); *American News Co.* v. *Federal Trade Commission*, 300 F

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2d 104 (C.A. 2), certiorari denied, 371 U.S. 824. Rather, it presents the narrow questions whether there was sufficient proof to support the findings: (a) that products of a grade and quality similar to those on which the discriminatory payments were made had been sold by the suppliers to competitors of the petitioner; and (b) that petitioner knowingly induced and received the allowances. The court of appeals held that the findings (J.A. 124, 126) were supported by substantial evidence.[4] Since the substantiality of the evidence is an issue "which Congress has placed in the keeping of the Courts of Appeals" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401), further review by this Court is not warranted.[5]

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[4] The first issue, covered in the court's general findings, is supported by direct testimony in the record (J.A. 106–107; 122; 147–148; 151–152; 157; 168–169; 175–177; 185–186; 188–189; 197–198). On the second issue, the court specifically concluded: "The cumulative effect of these facts supports a finding that Giant knew that it was the beneficiary of disproportionate payments through the program which it originated and sponsored" (Pet. App. 6a).

[5] Contrary to petitioner's contention (Pet. 16–18), there is no conflict with *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2). There the evidence on which the Commission relied for proof of sales of comparable products to other buyers merely showed the sale of "pork products", but without any further breakdown within this broad category; the court of appeals held that such evidence was insufficient to show that the seller had sold similar products to other buyers. Here, the evidence shows, and the Commission found, that payments to petitioner were for the latter's promotion of articles and brands which "are household bywords throughout the country", and that these suppliers were simultaneously selling these same articles and lines to petitioner's competitors, who were reselling them to the public (J.A. 124). The degree of

2. Petitioner argues that when read together, *Au*
matic Canteen Co. v. *Federal Trade Commission,*
U.S. 61, and *Exquisite Form Brassiere, Inc.* v. *F*
eral Trade Commission, 301 F. 2d 499 (C.A. D.C
certiorari denied, 369 U.S. 888, give it, as a buy
the benefit of all defenses which its suppliers wo
have had to a charge of making discriminatory p
ments, and, in addition, place on the Commission
burden of showing that the payments were not m
by the suppliers to meet competition for the buy
business; and that the Commission failed to int
duce evidence to meet this burden.

Even assuming that petitioner could utilize
Clayton Act defenses available to a seller under S
tions 2(a) and 2(b) as a defense to a charge
violating Section 5, the argument that the Comm
sion has the burden of negating such defenses r
on a misreading of *Automatic Canteen, supra.*
that case, the Court held, first, that a buyer char
with violation of Section 2(f) (which prohibit
buyer from knowingly inducing or receiving a
crimination in price prohibited by Section 2(a
could show that the discrimination in price which it
ceived was cost justfied, and, second, that the bur
of going forward with the evidence relating to
justification was on the Commission. The latter
ing was an application of the settled rule that "

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identification of the products necessary to establish that
crimination exists between customers is solely a question of
dence, and the fact that two different courts of appeals
different records, upheld the Commission's findings in one
but rejected them in another, presents no conflict of decisio

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burden of justifying a price differential ought to be on the one who 'has at his peculiar command the cost and other record data by which to justify such discriminations'" (346 U.S. at 79). The Court did not lay down the general rule that in all Commission proceedings the agency has the burden of negating all of a seller's defenses. The Court expressly differentiated between the burden of establishing the defense of cost justification and that of meeting competition, and declared that "[e]vidence * * * that the seller's price was made to meet a competing seller's offer to a buyer * * * might be available to a buyer more readily even than to a seller" (*id.*, n. 23). Thus, *Automatic Canteen* supports, rather than conflicts with, the decision below, since "considerations of fairness and convenience" properly call for placing upon the buyer, rather than upon the Commission, the burden of coming forward with evidence that the discriminatory allowances had been made to meet competition.[6] Unlike a seller's costs, information as to whether petitioner had received offers of allowances from a contributing supplier's competitors, and then asked the supplier to match them, was peculiarly within petitioner's knowledge.

3. Petitioner's attacks upon the scope and specificity of the order (Pet. 28–30) are similarly without substance. The court below fully heeded this Court's admonition in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368, as to the "necessity for fashioning orders which are, at the outset, sufficiently

[6] Actually, the proof of the manner in which the allowances were solicited in itself constituted a "coming forward" with evidence bearing on this issue. See p. 3, and the court of appeals discussion of the proportionalizing issue, Pet. App. 5a–6a.

clear and precise to avoid raising serious questions to their meaning and application." The Court specifically relied on this statement in *Broch* for its conclusion that "the order as presently worded is too broad," and it modified the order "so as to reflect with more preciseness the actual situation as developed in the record under review" (Pet. App. 7a). The substitution in the proviso, which prohibits inducing and receiving payments from suppliers, of the words "knows or could reasonably have learned" (Pet. App. 9a) for the Commission's phrase "knows or should know" (J.A. 120) made no change in the substance of the Commission's prohibition, but merely conformed it to the proof.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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